United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

75-2134

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
PAUL T. ROGERS,

Appellant,

-against-

J.J. NORTON, Superintendent,
Federal Correctional Facility,
Danbury, Connecticut;

PAUL REGAN, Chairman, New York
State Board of Parole; and

PETER PREISER, Commissioner of
Corrections, State of New York,

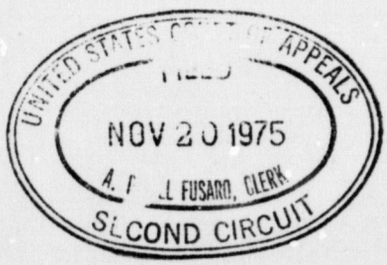
Appellees.

Docket No. 75-2134

B
P/S

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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OFFICE	YR.	NUMBER	MO.	DAY	YEAR	J	N/S	O	R	23	S	OTHER	NUMBER	DEM.	YR.	NUMBER
8-1	75	1137	03	07	75	3	520	1							75	1137 Pierce,J.

PLAINTIFFS

ROGERS, PAUL T.

DEFENDANTS

NORTON, J.J., Supt. Federal Corr. Facility, Danbury, Conn.
REGAN, PAUL, Chairman N.Y.S. Parole Board
PREISER, PETER, Commissioner of Correctional Services

CAUSE

F.L

WRIT OF HABEAS CORPUS
28 USC 2241

ATTORNEYS

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For Defendant:
Louis J. Lefkowitz
Attorney General- State of N
Two World Trade Center
N.Y., N.Y. 10047 - Attorney for Respondents Regan & Preiser.

74 Civ 1

CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
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				JS-6	

75-1137 Paul T. Rogers -V- J.J. Norton et-al 75-11

DATE	NR.	PROCEEDINGS
03-07-75	1	Filed petition for writ of habeas corpus.
03-07-75	2	Filed order granting petitioner to proceed in forma pauperis, Tenney, J.
03-28-75	3	Filed affdvt. and order extending respondents' (Regan & Preiser) time to file opposition to 4/25/75.--- Brieant, J.
04-01-75	4	Filed petitioner's affdvt. and motion for summary judgment.
04-16-75	5	Filed petitioner's affdvt. in reply to respondent's request for extension of time.
04-16-75	6	Filed notice of assignment to Pierce, J.
04-24-75	7	Filed Supplementary affidavit in support of motion for summary judgment by Paul T. Rogers.
04-28-75	8	Filed petitioners' affdvt in reply to affdvt in opposition to writ.
04-28-75	9	Filed respondents affdvt in opposition to petitioner'a application for a writ.
05-12-75	10	Filed memo endorsed on document #1--This matter is hereby referred to Magistrate Jacobs for his recommendation. In light of the fact that the petitioner is scheduled to be released on parole on June 4, 1975 the Magistrate is requested to submit his report, if at all possible, by May 23, 1975. So Ordered-Pierce,J.
07-15-75	10	Filed report of Mag. Jacobs.
07-15-75	11	Filed memo endorsed on document 10: The Court agrees with Magistrates recommend in his report, dated May 16, 1975. Accordingly, the petition is denied. Pierce, M/N
08-20-75	12	Filed memo endorsed on attache Notice of Appeal dated 8-20-75, : A certificate of probable cause is hereby issued and leave to proceed in f rma pauperis is granted, Pierce, J. M/N

A TRUE COPY
RAYMOND F. BURGHARDT, CLERK
By /s/ Thompson
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAUL T. ROGERS,

Petitioner,

- against -

J.J. NORTON, Superintendent, Federal Correctional Facility, Danbury, Conn.; PAUL J. REGAN, Chairman, New York State Board of Parole; PETER PREISER, Commissioner of Correctional Services,

Respondents.

REPORT OF MAGISTRATE JACOBS

75 Civ. 1137
Pro Se

(Judge Pierce)

Petitioner seeks by writ of habeas corpus to quash the detainer warrant filed against him and to be restored to parole. The matter was referred by Judge Pierce to the undersigned for recommendation.

I.

Petitioner is presently incarcerated in the Federal Correctional Facility, Danbury, Connecticut, pursuant to a judgment of conviction of the United States District Court (Judge Pierce) after a plea of guilty on June 21, 1974 for possession of stolen mail, having been sentenced on October 21, 1974 to a term of 18 months. At the time of that conviction the petitioner was on parole from the concurrent sentences imposed by Supreme Court, New York County, in June 1968 after a plea of guilty for robbery, grand larceny, assault and possession of a weapon.

After his arrest on the federal charge a detainer warrant was filed by the New York State Board of Parole on April 19, 1974. On October 31, 1974 petitioner applied to

8

the New York State Board of Parole for a revocation hearing but this was denied in a letter to petitioner dated November 19, 1974.

On December 3, 1974 petitioner filed a petition for a writ in the Supreme Court of New York requesting that the parole detainer be declared null and void and that he be discharged from the custody of the New York State Board of Parole. On December 20, 1974 the New York Court (Justice Roberts) directed, in reliance upon the landmark case of Morrisey v. Brewer, 408 U.S. 471 (1972), that petitioner was entitled to a revocation hearing and directed that such a hearing be had within 30 days. The Court said that "the mere fact that he is in the custody of a dual sovereignty is not in and of itself a sufficient basis to deny him that hearing which the United States Supreme Court has equated with due process" (Annex B, p. 3). This decision was eight months after the filing of the detainer warrant and the scheduled hearing held on January 28, 1975 was nine months after arrest. In his petition before the New York Supreme Court petitioner stated that he then had about nine months to serve on the federal sentence and "the pendency of the parole detainer severely limited the types of rehabilitative programs in which the petitioner might engage while in federal custody" and would normally be eligible for a variety of programs including change of custody, work release, furloughs, transfer to a Community Treatment Facility, and educational programs outside of the place of confinement (Annex A, p. 3).

Pursuant to the order of the New York Court a revocation hearing was held on January 23, 1975 (Annex to

Answering Affidavit of Assistant Attorney General sworn to April 25, 1975). As stated, that hearing was held nine months after the filing of the detention warrant. At the hearing petitioner offered proof that prior to his arrest on the federal charge he had been gainfully employed. The decision of the parole board stated "Violation of parole sustained by virtue of convictions and admissions. Parole is revoked."

There have been no further Court proceedings in the New York Courts.

On January 9, 1975 petitioner filed a petition with the District Court of Connecticut (Ex. C). He argued that "inasmuch as the New York State Court has not seen fit to order a hearing, petitioner deems that he has exhausted the available state remedies and correctly invokes the jurisdiction of this Court" and that the holding of a parole revocation hearing at this date cannot cure the constitutional defect (p. 5). He urged that the pendency of the detainer limited the types of rehabilitative programs in which the prisoner might engage while in federal custody (p. 3). On January 29, 1975 the Connecticut Court decided that "the Court best situated to resolve factual issues and to grant relief is the District from which the parole violation warrant originated" (New York).

II.

In his present petition petitioner contends that: (1) This court has jurisdiction to entertain the writ and (2) citing Morrisey he was entitled to a prompt hearing on

the parole revocation and the holding of a hearing nine months after the lodging of the warrant did not cure the alleged constitutional violation. Respondent contends that: (1) Petitioner has failed to exh[illegible] his state remedies since he has not presented his claim[illegible] th[illegible]ellate courts of New York and (2) The rule in this circuit is that even an unreasonable delay in holding a revocation hearing does not entitle petitioner to release since he admitted the charges against him and any delay did not result in prejudice in the conduct of the revocation hearing.

The petition presents serious questions which do not permit of an easy resolution.

A.

In support of his position that there was a failure to exhaust state remedies Respondent cites Carter v. York, 430 F.2d 1329 (2d Cir. 1970), failure to take a direct appeal from an order of the State Court denying an application for bail, and United States ex rel. Griffen v. Martin, 409 F.2d 1300 (2d Cir. 1969), failure to take an appeal from an order of contempt for the failureto make payments to the Family Court. Petitioner's position appears to be that here jurisdiction should be taken because of the unusual circumstances. In his petition before the Federal Court in Connecticut he urged (p. 9), that the normal appellate process was about 10 months and since he then had only five months to serve the issue might become moot and thus the Court should exercise jurisdiction. The matter of exhaustion was reviewed at length by the Supreme Court in Preiser v. Rodriguez, 411 U.S. 475 (1973) where the Court stated that "the rule of

exhaustion is rooted in consideration of federal-state comity" (p. 491) and that "... if the prisoner could make out a showing that, because of the time factor, his otherwise adequate state remedy would be inadequate, a federal court might entertain his habeas corpus immediately" since under the language of §2254(b) there exist "circumstances rendering such (state) process ineffective to protect the rights of the prisoner" (p. 497). Under the unusual circumstances here present it is believed that the Court should not decline jurisdiction.

B.

In United States ex rel. Buono v. Kenton, 287 F.2d 534 (2d Cir.) cert. den. 368 U.S. 846 (1961), decided in this Circuit before Morrisey, there was no hearing on the parole violation until three months and three weeks after the arrest and no formal order until after five months and three weeks. The District Court held that the unreasonable delay required the discharge of the parolee. In reversing the order the Court of Appeals held that "the mere fact that the hearing was unreasonably delayed does not of itself render the hearing a nullity" and that "if after an unreasonable delay a fair hearing is held which in all other respects satisfies the requirements of the statute an adjudication that the prisoner has violated parole is entitled to stand" (p. 536). The Court noted that in some instances long delay may make unavailable evidence favorable to the defendant. However, the parole violation was engaging in a policy racket which the parolee admitted. The Court concluded that to order the

release would be useless "since he could be immediately arrested and, following a prompt but repetitious hearing, his parole would be revoked" (p. 537).

In Morrisey parole was revoked without a hearing on the grounds that the petitioner had left the jurisdiction, was not gainfully employed, and had obtained a driver's license under an assumed name. The Court declared the broad principle that due process must be recognized in a revocation of parole and particular provisions to which defendant was entitled were discussed. The Court stated that it was necessary to have a preliminary hearing "as promptly as convenient while information is fresh and sources are available" (485) and that a revocation hearing must be "within a reasonable time after the parolee is taken into custody" (p. 488). The Court did not discuss the particular question as to the effect of an actual hearing unreasonably delayed but it might be argued that the only effective sanction for assuring a hearing within a reasonable time is to vacate the violation warrant.

In United States ex rel. Blassingame v. Gengler, 502 F.2d 1388 (2d Cir. 1974) decided in this Court after Morrisey, it appears from a Per Curiam decision that the District Court (Judge Carter) after a decision denying a motion for release held a revocation hearing. The Court stated that "a fair parole revocation hearing was held, at which Blassingame admitted five of the charged parole violations, and asserted no claim of prejudice resulting from the delay". Without referring to Morrisey the Court concluded that "the clear law of the Circuit is that such a

hearing renders Blassingame's custody lawful. United States ex rel. Buono v. Kenton, 287 F.2d 534 (2d Cir. 1961)".

The clear implication of Blassingame is that an unreasonable delay may be cured in an appropriate case by a later fair hearing. The Court said that there was "no claim of prejudice resulting from the delay" and it is believed that what the Court had in mind was prejudice as to the conduct of the actual hearing and not possible prejudice resulting from a mere delay in removing the taint of a detainer warrant on the assumption that the result of a hearing would be favorable to the petitioner. While it is possible to argue that discharge is necessary as an effective sanction such a drastic remedy appears inappropriate where the hearing does not involve the underlying offense for which petitioner was convicted but merely probation as possible punishment, petitioner admits the parole violation, and there is no prejudice in the conduct of the hearing.

It must be acknowledged that there are decisions in the District Court of Columbia which support petitioner's contention that an unreasonable delay is a constitutional defect which cannot be cured. In Sutherland v. D.C. Board of Parole, 366 F.Supp. 270 (D.C. 1973) petitioner was convicted in the District of Columbia and paroled. While on parole he committed another offense in Virginia and was serving a ten year sentence. The Board for the District of Columbia filed a detainer warrant, citing the Virginia conviction, but held no hearing on revocation since it expressed the intention of waiting until the expiration of petitioner's sentence. The Court held that petitioner might challenge the legality of

the detainer warrant even though its vacation would not result in his release (p. 272). It pointed out that a prompt hearing is essential since the detainer warrant may result in limitations on his personal liberty (p. 271). It concluded by saying that "Because more than five months have psssed since the contested detainer was lodged...., it is now too late for defendant to cure its error by affording plaintiff a revocation hearing." (p. 272)

The result in Sutherland was followed in Fitzgerald v. Segler, 372 F.Supp. 898 (D.C. 1974).

III.

In view of the decisions in this circuit that the failure to have a reasonably prompt hearing is cured by a later fair revocation hearing the petition must be denied. Here there was a fair hearing at which petitioner admitted the parole violations and there was no prejudice in the conduct of the hearing or any possible basis for inferring that an earlier hearing and determination might have been favorable to petitioner.

Dated: New York, New York
May 16, 1975

Martin P. Jacobs
U.S. Magistrate

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PAUL T. ROGERS, :

Petitioner, :

- v - : 75 Civ. 1137

J.J. NORTON, Superintendent, Federal Correctional Facility, Danbury, Conn.; PAUL J. REGAN, Chairman, New York State Board of Parole; PETER PREISER, Commissioner of Correctional Services, :

Respondents. :

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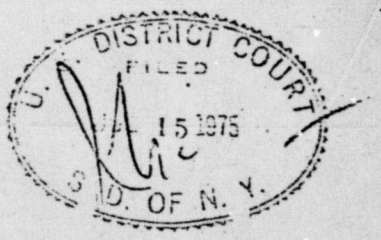

ENDORSEMENT ORDER

The Court agrees with the Magistrate's recommendations in his Report dated May 16, 1975 that it should not decline to exercise jurisdiction but should nevertheless deny the petition. While it is true that the delay in holding the parole revocation hearing would appear to be unreasonable the petitioner has not shown as required that such a delay resulted in prejudice as to the conduct of the hearing. See

United States ex rel. Blassingame v. Gengler, 502 F.2d 1388 (2d Cir. 1974). Accordingly, the petition is denied.

SO ORDERED.

Dated: New York, New York
July 10, 1975

LAWRENCE W. PIERCE
U. S. D. J.

JO/

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : CRIMINAL TERM PART 30

B

THE PEOPLE OF THE STATE OF NEW YORK ex rel.
PAUL T. ROGERS,

Petitioner,

-against-

Indictment No. 3779/67

NEW YORK STATE BOARD OF PAROLE,

Respondent.

GEORGE ROBERTS, J.:

On June 17, 1968 this petitioner was sentenced to a maximum of ten years on each of two counts of robbery and to a maximum of seven years on each of two counts of assault in the second degree and possession of a dangerous weapon, all of said sentences to run concurrently.

He was thereafter placed on parole. However, on April 18, 1974 he was rearrested on a federal charge, which arrest resulted in the Parole Board's lodging a detainer against him at his place of incarceration.

Having since been sentenced on the federal charges and having approximately nine months remaining on such sentence, he is, therefore, eligible for various rehabilitative programs were it not for the pendency of the parole warrant.

At this stage of the proceedings this petitioner, by this application, is requesting a hearing with respect to the revocation of his parole under the original state prison sentence, citing Morrisey v. Brewer, 408 U.S. 471; Sutherland v. D.C. Board of Parole, 366 F. Supp. 270 as well as other state and federal cases to the effect that even a new felony conviction does not dispense with the requirement of a revocation hearing (Gagnon v. Scarpelli, 411 U.S. 778) nor does a simultaneous

In opposition thereto, the Attorney General has adopted a contrary position, citing Matter of Mullins v. Board of Parole, 43 A D 2d 382 (1974), to the effect that in the case of a conviction for a new offense a revocation hearing is not always necessary (People ex rel. Maggio v. Cassales, 28 N Y 2d 415) particularly where the state would be required to conduct a hearing "at a great distance and expense that would have no effect on the ultimate custody status of parolees."

"Implicit in the system's concern with parole violations is the notion that a parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole. The first step . . . thus involves a wholly retrospective factual question . . . . Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be committed to prison or should other steps be taken to . . . improve chances of rehabilitation?" (Morrisey v. Brewer, supra, at page 480) In the light of this statement it is difficult to envision a situation where a parole revocation hearing "would have no effect." For good or ill, once the factual basis for the violation has been established, the returnee will either face substantial imprisonment or presumably different or greater supervision. At all events to assume that once the fact of the violation is established, even in the case of the commission of a new felony, the end result is predictable, is both superficial and not in accord with the modern concept of penology and imprisonment which is always deterent and rehabilitative and rarely punitive.

"The desire to punish, to express the community's and the victim's sense of outrage or felt need for revenge,

now has a diminished role in social thinking and thus in the operation of the criminal justice system." (Changing Concepts in Criminal Justice, Nanette Dembitz N.Y.L.J., Oct. 29, 1974, pp 1,3)

In the present case, having judicially established the commission of a parole violation in the federal court, "There must (still) be an opportunity . . . prior to a final decision on revocation by the parole authority. The hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation." (Emphasis supplied) (Morrissey v. Brewer, at page 488)

Whatever rationale would apply where the defendant is at a great distance, applying these principles to the case at hand where the defendant is readily available in the jurisdiction of the parole authorities, this court is not persuaded that the mere fa t that he is in the custody of a dual sovereignity provides in and of itself a sufficient basis to deny him that hearing which the United States Supreme Court has equated with due process.

Therefore, it is hereby ordered that the parole authorities afford this defendant a hearing as described in Morrissey v. Brewer, supra, at page 489, within thirty days of the receipt of this order or, in the alternative, that the parole warrant be revoked.

Dated: December 20, 1974

DEC 23 1974 GEORGE P. ROBERTS
DATE J.

of the board or members of the panel shall designate one member of the panel as

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

PAUL T. ROGERS :

v. : CIVIL NO. _____

JOHN J. NORTON, Warden, Federal Correctional Institution, Danbury, Connecticut : B75 33

MEMORANDUM OF DECISION

Petitioner, presently confined at the Federal Correctional Institution, Danbury, Connecticut, seeks habeas relief with respect to a parole violation warrant issued by the New York State Board of Parole and lodged against him as a detainer at Danbury. Petitioner contends that the failure of the Board to hold a parole revocation hearing in the months since the warrant was issued violates his constitutional rights; he seeks a Court order quashing the warrant and the detainer upon which it is based.

The moving papers indicate that the petitioner has already obtained partial judicial relief in his case. On December 3, 1974, the petitioner filed a petition for writ of habeas corpus with the Supreme Court of the State of New York, County of New York, setting forth the same facts as petitioner alleges here. On December 26, 1974, the Supreme Court ordered the New York authorities to afford petitioner a revocation hearing within 30 days or the parole warrant would be revoked. Petitioner is presently scheduled for a parole revocation

hearing.

hearing on January 28, 1975 at Greenhaven Prison in New York. However, he now argues that the holding of a revocation hearing at this late date cannot remedy the deprivation of his rights.

Whatever the merits of petitioner's claim, see Sutherland v. District of Columbia Bd. of Parole, 366 F.Supp. 270 (D.D.C. 1973); Gaddy v. Michael, Civil No. C-73-299 (W.D.N.C. Aug. 15, 1974), he may not pursue them in this forum. Where a federal prisoner attacks a detainer and the parole violation warrant upon which the detainer is based, the district courts in both the district of confinement and the district from which the warrant issued have habeas corpus jurisdiction. However, absent specific allegations that the detainer is adversely affecting the conditions of confinement, see Cooper v. Lockhart, 489 F.2d 308 (8 Cir. 1973), the court best situated to resolve factual issues and to grant relief is the district from which the parole violation warrant originated. Arrington v. Norton, Civil No. B-74-428 (D.Conn. Nov. 25, 1974); Jefferson v. Norton, Civil No. B-74-402 (D.Conn. Nov. 4, 1974); cf. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973); United States ex rel. Meadows v. New York, 426 F.2d 1176 (2 Cir. 1970).

Accordingly, the petition is dismissed without prejudice to the presentation of a similar petition in the appropriate forum.

The papers may be filed without fee.

(f) At a violation hearing the hearing officer shall receive and may consider any

Dated at New Haven, Connecticut, this 27th day of January, 1975.

Robert C. Zampano
United States District Judge

PART 1900

GENERAL PROVISIONS

(Statutory authority: Correction Law, §§ 6-a, 6-c, 112)

Historical Note

Part (§§ 1900.1, 1900.5, 1900.10, 1900.15, 1900.20) filed Dec. 17, 1974 eff. Dec. 30, 1974.

Section 1900.1 Applicability. The rules and regulations set forth in this Chapter implement and govern the powers and duties of the board of parole to:

(a) Determine what inmates serving an indeterminate or reformatory sentence of imprisonment may be released on parole and when and under what conditions.

(b) Determine what inmates serving a definite sentence of imprisonment may be released on conditional release and when and under what conditions.

(c) Determine the conditions of release of a person who may be conditionally released under an indeterminate or reformatory sentence of imprisonment.

(d) Revoke the parole or conditional release of any person and issue a warrant for retaking of such person.

(e) Fix the minimum period of imprisonment for an indeterminate sentence of imprisonment where the court has not.

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

1900.5 Definitions. When used in this Chapter:

(a) *Board* means the State Board of Parole in the Department of Correctional Services, located at Building No. 2, State Campus, Albany, New York 12226.

(b) *Releasee* means a person subject to the custody of the department on parole or conditional release.

(c) *Preliminary violation hearing* means a hearing to determine whether there is reasonable ground to believe that a releasee has violated one or more conditions of release.

(d) *Final violation hearing* means a hearing to determine whether a releasee has violated one or more conditions of release and whether the releasee shall be returned to incarceration.

(e) *Violation hearing* means a preliminary violation hearing and a final violation hearing.

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

1900.10 Stay and amendment of rules. In its discretion the board, with the approval of the commissioner where required by law, may direct, orally or in writing that any rule or regulation set forth in this Chapter may be stayed, suspended, rescinded, modified or otherwise amended temporarily or indefinitely. If the direction is oral, it shall be reduced to writing as soon as practicable and if the direction constitutes an indefinite amendment, it shall be filed with the Secretary of State.

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

1900.15 Modification of decision. In its discretion, the board may revoke or modify any of its decisions or determinations.

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

1900.20

Historical Note

Sec. filed Dec. 17, 1974; repealed, filed Feb. 14, 1975 eff. immediately.

PART 1905

MINIMUM PERIOD OF IMPRISONMENT

(Statutory authority: Correction Law, §§ 6-a, 6-c, 112)

Historical Note

Part (§§ 1905.1, 1905.5) filed Dec. 17, 1974 eff. Dec. 30, 1974.

Section 1905.1 Reformatory sentence. Except where extraordinary circumstances prevail which would warrant the board's consideration prior thereto, inmates serving reformatory sentences shall appear before the board during the fifth month of their sentence, excluding jail time, at which time the board shall determine the minimum date on which such inmates shall appear before the board for parole consideration.

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

1905.5 Indeterminate sentence. Inmates serving indeterminate sentences in which the court has not fixed the minimum period of imprisonment shall appear before the board during the 10th month of their sentence, excluding jail time, at which time the board shall determine the minimum period of imprisonment to be served by such inmates prior to their appearance before the board for consideration for release on parole.

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

PART 1910

PAROLE RELEASE

(Statutory authority: Correction Law, §§ 6-a, 6-c, 112)

Historical Note

Part (§§ 1910.5, 1910.10, 1910.15, 1910.20) filed Dec. 17, 1974 eff. Dec. 30, 1974.

Section 1910.5 In general. The maximum term of imprisonment, and not the minimum period of imprisonment, represents the total sentence of an inmate. It is not a right of an inmate to be paroled at the expiration of his minimum period of imprisonment. The board exercises its discretion as to when, in the interests of the individual himself and of society, it is best to grant release. In compliance with the Correction Law, no person is released on parole merely as a reward for good conduct or efficient performance of duties; such release is granted only if the board is of the opinion that there is reasonable probability that the inmate will not violate the law and that his release is not incompatible with the welfare of society.

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

1910.10 Release consideration. (a) When an inmate is certified as eligible for release on parole he shall be scheduled to appear before the board for consideration for release on parole.

(b) Inmates serving reformatory sentences shall not become eligible for consideration for release on parole until the expiration of the time previously set by the board as their minimum date of eligibility.

(c) The board will not grant or withhold the release under parole supervision of indeterminate sentence inmates who receive compensation benefits under the provisions of subdivision 4 of chapter 826 of the Laws of 1962. The board will assume jurisdiction over these inmates only when they sign an agreement accepting the supervision of the board for the period or time for which their sentences have been reduced through the operation of article 9 of the Correction Law. The contract or agreement which these inmates sign shall include the same conditions imposed upon indeterminate sentence inmates paroled at the discretion of the board.

(d) Applications for the parole of inmates are not authorized by statute and no such application will be entertained by the board either from inmates, their attorneys, or other interested parties.

(e) Neither the inmate's attorney nor any other party will be permitted to attend or speak in person in the inmate's behalf or against him at any meeting of the board at which the inmate's release on parole is being considered. The board shall have complete discretion with respect to the presence of any other persons.

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

1910.15 Criteria for release. The following are some of the factors that will be considered by the board in determining the release on parole of every inmate.

(a) His previous criminal record; the nature and circumstances of the crime and his present attitude toward it; his attitude toward the police officer who arrested him, toward the district attorney who prosecuted him, toward the judge who sentenced him, and toward the complainant.

(b) His conduct in the institution, his response to efforts made to improve his mental and moral condition, together with his academic, vocational and industrial training records; his character, capacity, mentality, physical and mental condition, habits, attitudes; the kind of work he is best fitted to perform and at which he is most likely to succeed when he leaves the institution.

(c) The environment to which he plans to return.

(d) The kind of employment, educational or other specified program secured for him.

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

1910.20 Parole program. Prior to his release every inmate shall attempt to obtain suitable employment if he is able to work, a suitable educational program or other program specified by the board. The board may, however, release an inmate on parole without a definite offer of employment if it is satisfied that such inmate will probably be suitably employed, enrolled in a suitable educational program or other program specified by the board if so released on parole. Offers of employment, educational program or other specified program must be filed with the parole representative at the institution or with the officer in charge of the office in the area from which the offer originates.

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

PART 1915

RELEASE CONDITIONS

(Statutory authority: Correction Law, §§ 6-a, 6-c, 112)

Historical Note

Part (§§ 1915.5, 1915.10, 1915.20) filed Dec. 17, 1974 eff. Dec. 30, 1974.

Section 1915.5 Release conditions. (a) The law provides that a releasee remains in the legal custody of the department until his final discharge from parole or conditional release. A releasee is subject to be retaken and returned to the institution upon any violation of law or upon any violation of the release agreement or the rules and regulations of the board.

(b) Parole or conditional release does not consist merely of the making of reports or the filling out of a certain number of monthly report blanks. The individual is expected to comply faithfully with all conditions specified in his release agreement and all other conditions and instructions given him by the board or one of its members or an authorized representative.

(c) Parole or conditional release will not be granted to any individual except upon the distinct understanding that he agrees to the conditions of release as prescribed by the board in section 1915.10 of this Part. The agreement which specifies the conditions of release must be signed by the inmate himself to indicate that he understands and agrees to such conditions.

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

1915.10 Release agreement. The following conditions of release shall be included in the release agreement, which agreement shall be completed and executed prior to the release of all persons who are subject to supervision:

"I, ... in consideration of being granted release, promise, with full knowledge that failure to keep such promise may result in the revocation of my release, that I will faithfully keep all the conditions specified in this agreement and all other conditions and instructions given to me by the board or any of its representatives.

(1) I will proceed directly to ....., the place to which I have been released (spending funds only for necessities), and within twenty-four hours, I will make my arrival report to .....

(2) I will not leave the state of New York, or any other state to which I may be released or transferred, or any area as defined by the parole officer without the written or documented permission of my parole officer.

(3)(a) I will fully comply with the instructions of my parole officer. (b) I will make office and written reports as I am directed. (c) I will reply promptly, fully and truthfully to any communication from a member of the board, a parole officer, or other authorized representative of the board. (d) I am aware that making false reports or replies may be considered a violation of the condition of my release.

(4)(a) I will permit my parole officer to visit me at my residence or place of employment. (b) I will discuss with my parole officer any proposed changes in my residence, and I will not change my residence without prior approval of my parole officer. (c) I understand that I am legally in the custody of the department and that my person, residence, or any property under my control may be searched by my parole officer or by any other representative of the board. (d) If so directed, I will observe a curfew.

(5) I will avoid the excessive use of alcoholic beverages. If so directed by the board of parole or my parole officer, I will abstain completely from the use of alcoholic beverages.

(6)(a) I will make every effort to secure and maintain gainful employment. (b) If, for any reason, I lose my employment, I will report this to

my parole officer immediately and I will cooperate fully in finding new employment. (c) I will not voluntarily quit my employment without prior approval of my parole officer.

(7)(a) I will lead a law-abiding life and conduct myself as a good citizen. (b) I will not knowingly be in the company of or fraternize with any person having a criminal record. If there are unavoidable circumstances (such as work, school, family or group therapy and the like), I will discuss these with my parole officer and seek his permission. (c) I will support my dependents, if any, and assume toward them my legal and moral obligations. (d) I promise my behavior will not be a menace to the safety or well-being of myself, other individuals, or to society. (e) I will advise my parole officer at any time that I am questioned or arrested by members of any law enforcement agency.

(8) I will consult with my parole officer before applying for a license to marry.

(9) I will not carry from the corectional institution from which I am released, or cause to be delivered or sent to any correctional institution, any written or verbal message or any object or property of any kind without proper permission.

(10)(a) Upon my release, I will advise my parole officer as to the status of any driver's license I possess. (b) I will seek and obtain permission of my parole officer before applying for or renewing a driver's license. (c) I will request and obtain permission of my parole officer before owning or purchasing any motor vehicle.

(11) I will not own, possess, or purchase firearms or weapons of any kind.

(12) I will not use, possess, or purchase any illegal drugs or use or possess those that have been unlawfully obtained.

(13) Should the occasion arise, I will waive extradition and will not resist being returned to the State of New York.

"

(14) Special conditions:

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

1915.20 Discharge from parole or conditional release. Discharge of a releasee shall be as provided by law. Since administrative procedures have been established for submission of appropriate cases to the board as eligibility for discharge is reached, the board and members of its staff shall not, under any circumstances, entertain requests for such discharge from a releasee or from others in his behalf.

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

PART 1920

VIOLATION OF PAROLE OR CONDITIONAL RELEASE

(Statutory authority: Correction Law, §§ 6-a, 6-c, 112)

Historical Note

Part (§§ 1920.1, 1920.5, 1920.10, 1920.15, 1920.20) filed Dec. 17, 1974 eff. Dec. 30, 1974.

Section 1920.1 In general. A person who fails to comply with the terms of his release may be declared delinquent and may thereafter be returned to an appropriate correctional institution. A person on parole may be returned for a period equal to the unexpired portion of the maximum term of imprisonment as of the date he was declared delinquent; a person on conditional release may be returned for a period equal to the unexpired portion of the term of imprisonment as of the date of his conditional release.

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

1920.5 Violation warrants; declaration and cancellation of delinquency. (a) For the purpose of this section, *designated officer* means a senior parole officer or any officer of the department assigned to field services holding a title above senior parole officer and shall include any officer assigned to field services who is designated by a superior to act in any such titles.

(b) A warrant for the retaking and temporary detention of a parole or conditional release violator may be issued by a member of the board or by a designated officer; provided, however, that no designated officer shall issue a warrant in a case in which he would also be the officer recommending the issuance of the warrant. Warrants are considered issued when signed by a board member or by a designated officer.

(c) Whenever a warrant for the arrest or retaking and temporary detention is issued, a violation of parole report shall be prepared and presented to a member of the board.

(d) Only a board member may declare a releasee delinquent and order the releasee's return to the institution from which he was released, or institution designated by the commissioner. Upon such declaration and order the board member shall sign a warrant of return which shall subsequently be substituted for the warrant for the retaking and temporary detention, and the name of the releasee shall be placed on the official list of delinquents.

(e) In all cases where a releasee is to be restored to supervision or delinquency is to be cancelled, such action shall be taken only upon unanimous consent of three members of the board considering the case, except as otherwise provided by sections 1920.10 of this Part and 1923.33 of this Title.

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

1920.10 Arrest for crime during release. (a) If a releasee is arrested for a felony and held for court action, a warrant for retaking and temporary detention shall be filed against him unless otherwise directed by the area supervisor. Where such warrant is filed, for good cause shown or on its own motion, a majority of the entire board may lift the warrant and cancel delinquency pending the disposition of

the charges by the court, except that where a person has been released pursuant to the provisions of article 25 of the Correction Law, one member of the board may lift the warrant and cancel delinquency pending disposition of the charges by the court. In the event the felony charge is superseded by a charge of an offense other than a felony, the procedure set forth in subdivision (b) of this section shall be applicable.

(b) If a releasee is arrested on an offense other than a felony and held for court action, a warrant for retaking and temporary detention may be filed against him. Where such warrant is filed, for good cause shown or on its own motion, three members of the board may lift the warrant and cancel delinquency pending the disposition of the charges by the court, except that where a person has been released pursuant to the provisions of article 25 of the Correction Law, one member of the board may lift the warrant and cancel delinquency pending disposition of the charges by the court.

(c) If a releasee is arrested for a [illegible] and a warrant for retaking and temporary detention is not filed against him, a violation of parole report or, in the case of a misdemeanor a violation of parole report or a misconduct report shall be submitted to a member of the board. Upon review of the report the board member may direct that a warrant for retaking and temporary detention be filed against the releasee.

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

1920.15 Violation hearing. (a) Except as provided by subdivision (b) of this section and section 1920.20 of this Part, a releasee for whom a warrant for retaking, temporary detention or return to an institution has been issued shall be entitled to a preliminary violation hearing and a releasee for whom a warrant for return to an institution has been issued shall be entitled to a final violation hearing.

(b) A releasee may waive a preliminary hearing.

(c) The conduct of a violation hearing shall be as provided in Part 1925 of this Title.

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

1920.20 Conviction of crime during release. (a) If a releasee is convicted of a crime,

(1) such conviction is proof of the releasee's violation of conditions of his parole or conditional release, as the case may be, and

(2) no preliminary violation hearing is thus required to determine whether there are grounds to believe that such person has violated the conditions of his parole or conditional release, as the case may be.

(b) If a person subject to an indeterminate sentence of imprisonment is released on parole or conditional release and thereafter during the period of parole or conditional release is convicted of a felony and sentenced to an indeterminate term of imprisonment to run concurrently or consecutively to the undischarged indeterminate sentence,

(1) such judgment of conviction is proof of such person's violation of the conditions of his parole or conditional release, as the case may be;

(2) no preliminary violation hearing is required to determine whether there are reasonable grounds to believe that such person has by the commission of a felony violated the conditions of his parole or conditional release, as the case may be;

(3) the return of such person to incarceration and the mandatory calculation of both sentences pursuant to Penal Law section 70.30(1) constitutes revocation of parole or conditional release, as the case may be, as a matter of law and obviates the need for a final violation hearing to determine whether such person has violated the conditions of his parole or conditional release, as the case may be, by the commission of a felony and whether such person should be returned to incarceration;

(4) the date of delinquency shall be the date of the commission of the felony; and

(5) if at the time of the inmate's appearance for the setting of a minimum period of imprisonment or first appearance for parole consideration, the inmate is not re-released the board of parole must specify a date for reconsideration based on the first or second sentence whichever has the longest unexpired maximum term.

(c) If a person subject to a definite sentence of imprisonment is released on conditional release and thereafter during the period of conditional release is convicted of a crime and sentenced to a definite term of imprisonment to run concurrently or consecutively to the undischarged definite sentence,

(1) such judgment of conviction is proof of such person's violation of the conditions of his parole or conditional release, as the case may be;

(2) no preliminary violation hearing is required to determine whether there are reasonable grounds to believe that such person has by the commission of a crime violated the conditions of his parole or conditional release, as the case may be;

(3) the return of such person to incarceration and the mandatory calculation of both sentences pursuant to Penal Law section 70.30(2) constitutes a revocation of conditional release as a matter of law and obviates the need for a final violation hearing to determine whether such person has by the commission of a crime violated the conditions of his parole or conditional release, as the case may be, and whether such person should be returned to incarceration;

(4) the date of delinquency shall be the date of the commission of the crime.

(d) Notwithstanding subdivisions (a), (b) and (c) of this section, if a person subject to supervision on parole is convicted of a crime and there is reasonable cause to believe that such person has violated any other condition of his parole and that the date of delinquency for such violation would antedate the date of delinquency for the commission of the crime, then such person shall be entitled to a preliminary and final violation hearing with respect to such violation.

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

PART 1925

VIOLATION HEARINGS

(Statutory authority: Correction Law, §§ 6-a, 6-c, 112)

Historical Note

Part (§§ 1925.1, 1925.15, 1925.20, 1925.25, 1925.30, 1925.33) filed Dec. 17, 1974 eff. Dec. 30, 1974.

Section 1925.1 Applicability; nature of hearing. (a) The rules and regulations set forth in this Part shall govern the conduct of a violation hearing.

(b) The relationship between a parole officer and a releasee is a social case-worker-client relationship; accordingly, violation hearings are not adversary proceedings.

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

1925.15 Notice of violation. (a) A releasee entitled to a violation hearing shall be presented at least 24 hours prior to the preliminary violation hearing with a notice of violation.

(b) The notice of violation shall consist of a written specification of the particulars of the violation, including the date, time and place of the violation. Where two or more related violations are involved, all may be incorporated in a single specification.

(c) A notice of violation shall advise the releasee substantially as follows:

"You are hereby advised that with respect to the violation alleged you may be entitled to a preliminary and final violation hearing.

"The purpose of the preliminary violation hearing is to determine whether there is reasonable ground to believe that you violated one or more conditions of release.

"The purpose of the final violation hearing is to determine whether you have violated one or more conditions of release and whether you shall be returned to incarceration.

"You may waive a preliminary violation hearing. Regardless of whether you waive the preliminary violation hearing, if you are ordered returned to a correctional institution and if by law you are entitled to a final violation hearing, you shall be accorded the final violation hearing.

"You may request to be represented by an attorney at the preliminary violation hearing. Upon your request, the hearing officer in his discretion may grant or deny the request.

"You are entitled to be represented by an attorney at a final violation hearing

"At both the preliminary and final violation hearing you will be accorded an opportunity to be heard, to present witnesses and information relevant and material to the purpose of the hearing, to confront and cross-examine witnesses presented in support of the notice of violation, and to review and controvert documentary or written information presented in support of the notice of violation."

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

1925.20 Hearing officer. (a) *Preliminary violation hearing.* A preliminary violation hearing shall be conducted by a member of the board or designated employee of the department; provided, however, that the department employee responsible for the supervision of the releasee or other department employee directly involved in the case may not conduct the preliminary violation hearing.

(b) *Final violation hearing.* (1) Except as provided in paragraph (2) of this subdivision, a final violation hearing of a releasee from a State correctional institution shall be conducted by a three member panel of the board. The chairman of the board or members of the panel shall designate one member of the panel as the hearing officer. The hearing officer shall conduct the final violation hearing. The concurrence of at least two members of the panel shall be necessary for a final determination of the proceeding.

(2) A final violation hearing of a person conditionally released from a State or local correctional institution pursuant to Correction Law, article twenty-five, shall be conducted by a member of the board.

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

1925.25 Releasee representation. (a) *Preliminary violation hearing.* In the discretion of the hearing officer a releasee at a preliminary violation hearing may be permitted to be represented by an attorney at such hearing. In the exercise of his discretion the hearing officer shall consider whether the releasee's request to be represented by an attorney is based on a timely and colorable claim that he has not committed the alleged violation of the conditions upon which he is at liberty; whether the releasee appears capable of speaking effectively for himself; whether the releasee may have difficulty in presenting his version of the disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence. If a request to be represented by counsel at a preliminary violation hearing is denied, the ground for denial shall be stated in the record.

(b) *Final violation hearing.* A releasee may be represented by an attorney at a final violation hearing.

(c) *Notice of appearance.* An attorney who represents a releasee at a violation hearing shall file a timely notice of appearance with the secretary of the board stating his name, office address, telephone number and name of the person represented.

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

Decisions

—right to counsel

Held that a parolee's due process right to counsel at a preliminary parole revocation hearing under the New York State Constitution is co-extensive with that under the Federal Constitution. The decision as to the need for counsel should be made in the exercise of discretion in accordance with the guidelines set forth in *Gagnon* v. *Scarpelli* (_____U.S._____). The right to preliminary and final parole revocation hearings is prospective, i.e. if on the date of the decision in *Morrissey* v. *Brewer* (408 U.S. 471) the parolee had not yet been declared delinquent (7 NYCRR 1.17 [cf. 1925.23]) he is entitled to a preliminary hearing. A parolee is not entitled to bail or release pending a hearing. *People Ex Rel Calloway* v. *Skinner*, 33 NY 2d 23 (1973).

Held that parolees have no statutory or constitutional right to be represented by counsel when appearing before the State Parole Board in a parole revocation proceeding (9 NYCRR 155.11-155.16, 155.19 [cf. 1925.25]). *People ex rel. Johnson* v. *Follett*, 58 Misc 2d 474 (1968).

1925.30 Violation hearing schedule. (a) *Preliminary violation hearing.* A releasee who is entitled to a preliminary violation hearing and who does not waive the hearing shall be accorded a preliminary violation hearing as soon as practicable.

(b) *Final violation hearing.* A releasee who is entitled to a final violation hearing shall be accorded the final violation hearing as soon as practicable after the releasee's return to a State correctional institution or at such other place as may be designated by the board.

(c) *Violation report.* A copy of the violation report, excluding confidential ma-

terial, shall be presented the releasee or his attorney prior to the final violation hearing.

(d) *Adjournment.* For good cause, the chairman of the board or the hearing officer may grant an adjournment of a violation hearing.

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

Decisions

1. Right to "preliminary hearing"

Held that where a parole revocation hearing has been held at which it has been found in accord with due process that there has been a parole violation (7 NYCRR 1.17, 1.19 [cf. 1925.30]) the preliminary hearing required by *Morrissey* v. *Brewer* (408 U.S. 471) is unnecessary. If the validity of the revocation hearing is questioned a proceeding to review the determination made therein may be brought. Held further that the decision in *Morrissey* applies to future revocation proceedings only. *Matter of Richardson* v. *New York State Bd. of Parole*, 41 AD 2d 179 (1973), revg. 71 Misc 2d 36 (1972), aff'd. 33 NY 2d 23 (1973).

Held that a parolee detained by virtue of a detainer or warrant issued by a member of the Board of Parole or by his designated official (Correction Law, §§ 216-218; 7 NYCRR 1.17 [cf. 1925.30]) is entitled to a prompt preliminary hearing with all the safeguards of due process. A prompt hearing means one held within one week of the filing or execution of the detainer, whether or not a charge is pending against the parolee, unless unusual circumstances properly verified are present. The practice of permitting disposition of a parolee's writ of habeas corpus by the expedient of rearresting the parolee on a new charge, releasing him on bail and then "lifting" the detainer, will no longer be countenanced. *Matter of Thompson* v. *McEvoy*, 71 Misc 2d 902 (1972).

Held that the procedure whereby a realtor upon arrest, may be deprived of his liberty indefinitely without an opportunity to provide bail, to assure his continued presence in the jurisdiction and without any hearing whatsoever to ascertain whether there be any factual basis for so depriving him of such liberty (7 NYCRR 1.18 [cf. 1925.30]), other than the fact that he has been accused of crimes violates due process. Parole violation warrant vacated and defendent released unless a due process parole violation hearing held within 20 days. *People Ex Rel Cordero* v. *Thomas*, 69 Misc 2d 28 (1972).

1925.35 Violation hearing procedure. (a) The releasee shall be entitled to be present at a violation hearing; provided, however, that a releasee who conducts himself in so disorderly and disruptive a manner that the hearing cannot be carried on with him in the hearing room, may be removed therefrom if, after the hearing officer has warned him that he will be removed if he continues such conduct, he continues to engage in such conduct. The presence of any other person at a violation hearing shall be in the discretion of the hearing officer.

(b) Unless waived by the attorney for the releasee, at a violation hearing the hearing officer shall first read the notice of violation to the releasee and ascertain that the releasee understands the violation alleged and the advice to the releasee specified in the notice of violation pursuant to subdivision (c) of section 1925.15 of this Part that is relevant to the instant hearing.

(c) At a preliminary violation hearing, where the releasee has requested to be represented by an attorney, the hearing officer may examine the releasee or other person or document that may contribute information relevant and material to the request and shall grant or deny the request in accord with subdivision (a) of section 1925.25 of this Part.

(d) At a violation hearing the hearing officer shall then interview the releasee and ask him whether he admits or denies the substance of the violation. If at a violation hearing the releasee denies the substance of the violation, the hearing shall proceed as specified in this section. If at a preliminary violation hearing the releasee admits the substance of the violation or variation thereof acceptable to the hearing officer, the hearing officer shall render a disposition in accord with subdivision (j) of this section. If at a final violation hearing the releasee admits the substance of the violation or variation thereof acceptable to the hearing officer, the hearing may proceed as specified in this section and may be limited to the receipt of information relevant and material to determining whether the releasee shall be returned to incarceration and the hearing officer shall render a disposition in accord with subdivision (k) of this section.

(e) At a violation hearing the hearing officer may interview any person who can contribute relevant and material information.

(f) At a violation hearing the hearing officer shall receive and may consider any documentary or written information relevant and material to the purpose of the hearing. The record of the preliminary violation hearing and the violation report shall be deemed incorporated into the final violation hearing record and may be considered by the hearing officer.

(g) At a violation hearing the releasee shall be accorded an opportunity to be heard, to present witnesses and information relevant and material to the purpose of the hearing, to confront and cross-examine witnesses presented in support of the notice of violation, and to review and controvert documentary or written information presented in support of the notice of violation.

(h) The rules of evidence shall not apply to a violation hearing. All information provided by witnesses, affidavits, documents or otherwise must be relevant and material to the violation alleged and must not be unduly repetitious.

(i) Pursuant to Correction Law, section 6-a(5) any member of the board may issue a subpoena or subpoena duces tecum and may administer oaths and take the testimony of a person under oath. Pursuant to and in accord with the Civil Practice Law and Rules article 23, an attorney representing a releasee at a violation hearing may issue a subpoena or a subpoena duces tecum except that only a court may issue a subpoena for an inmate or subpoena duces tecum to be served on the department.

(j) At the conclusion of the preliminary violation hearing:

(1) the hearing officer shall determine whether there is reasonable ground to believe that the releasee has violated one or more conditions of release.

(2) if the hearing officer is satisfied that there is no reasonable ground to believe that a releasee has violated one or more conditions of release he shall dismiss the notice of violation and direct the releasee be restored to supervision.

(3) if the hearing officer is satisfied that there is reasonable ground to believe that a releasee has violated one or more conditions of release he shall direct that the releasee be held for the action of the board.

(k) At the conclusion of a final violation hearing:

(1) if the board panel is not satisfied that there is substantial evidence in support of the violation the panel shall dismiss the violation, cancel delinquency and restore the releasee to supervision.

(2) if the board panel is satisfied that there is substantial evidence that the releasee violated one or more conditions of release the panel shall affirm the violation; and

(i) if the board panel affirms the violation and is satisfied that the releasee should be re-incarcerated the panel shall direct the releasee's re-incarceration and shall fix a date for consideration by the board for re-release on parole or conditional release, as the case may be.

(ii) if the board panel affirms the violation but is not satisfied that the releasee should be re-incarcerated, the panel shall restore the releasee to supervision.

(l) As soon as practicable after the violation hearing, the releasee and his attorney shall be advised of the violation hearing determination, including the reason for the determination and the evidence relied upon.

Historical Note

Sec. filed Dec. 17, 1974 eff. Dec. 30, 1974.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Filed 10/22/75

PEOPLE OF THE STATE OF NEW YORK
ex rel. RICHARD ALSTON,

Petitioner,

- against -

SUPERINTENDENT, Green Haven Correctional Facility; NEW YORK STATE BOARD OF PAROLE,

Respondents.

Index No.
Motion Date Sept. 12, 1975
Motion Cal. No. 122
Held at Green Haven Correctional Facility.

WOOD, J.

Relator in this habeas corpus proceeding alleges that he should be released from custody due to failure by the State of New York to properly execute on its parole violation detainer warrant.

Relator was sentenced to a term of 7 1/2-15 years in Supreme Court, Queens County, on September 22, 1959, and was released on parole on or about February 22, 1970. While on parole relator was arrested by Federal authorities on February 24, 1971 in New Orleans, Louisiana and, after trial, was convicted and sentenced to federal prison on November 24, 1971 for a term of 2-10 years on one count and a concurrent term of 5-20 years on a second count. On March 12, 1971, the New York State Board of Parole caused a detainer warrant to be filed against relator at his then place of incarceration in New Orleans Louisiana. After sentence, relator, on January 5, 1972, was incarcerat in the Federal House of Detention at Atlanta, Georgia and in 1973 he w transferred to the Federal Correctional Institution, Lexington, Kentucky. Having filed its detainer warrant of March 12, 1971 with th federal authorities, respondents, as of that date, at least, were full aware of relator's whereabouts and the cause of his detention.

At relator's request, on two occasions, inquiries were made of New York as to the status of its warrant. In 1973 while relator w

incarcerated at Atlanta, Georgia and in November, 1974, while he was in Lexington, Kentucky inquiries were made of New York as to the status of its detainer warrant. In March, 1975, the correctional institution at Lexington, Kentucky inquired, by letter dated March 5, 1975, of the New York authorities, of the current status of New York's detainer warrant since relator, at that time, was being favorably considered by the federal authorities for parole which was ultimately granted relator to be effective on April 23, 1975 if relator was released to the custody of New York authorities or, if the detainer was withdrawn, to be effective July 14, 1975. On June 9, 1975 relator was released to the custody of the New York State Board of Parole, pursuant to the detainer warrant which had been lodged against relator since March 12, 1971 - more than four years earlier.

It is relator's complaint that his present detention is illegal because of respondents' inordinate delay in the execution of its detainer warrant and the consequent deprivation of due process to relator's prejudice. The prejudice asserted by relator is that first, a four year delay in the execution of the detainer warrant and the consequent parole revocation hearing is prima facie prejudicial, second, that by this delay "federal institutional personnel have been prevented from building on the progress they feel they have so far made with petitioner (relator)", and finally, the delay "has deprived petitioner of the opportunity to receive credit towards his New York sentence for time served in federal custody. ..... By executing the parole warrant and revoking parole, but then reparoling petitioner, the parole board could have given petitioner credit against his sentence for time spent in federal custody. It was within the parole board's discretion to do this: Corrections Law §212 (7) (McKinney's Supp. 1974) ....."
(Relator's Memorandum of Law, p. 14)

It has been held that the right to a speedy parole revocation hearing cannot be denied "simply because that person (the parolee) is

being held on new criminal charges in a facility within the State not under the jurisdiction of the State Department of Correction....." (Peo. ex rel. Allah v. Warden, 47 A.D. 2d 485, 490). Nothing has been brought to the attention of the Court which would require a holding otherwise merely because the detention on other charges is in a facility without the State. See: Gay v. U. S. Board of Parole, 349 Fed. Supp. 1374 (E.D. Va. 1975)

A prompt revocation hearing has been mandated by Morrissey v. Brewer, 408 U. S. 471. It has been held by courts of coordinate jurisdiction that a delay of over sixty (60) days in the scheduling of a final revocation hearing constitutes a denial of due process. (People ex rel. Cohen v. Vincent, Sup. Ct., Dutchess County, March 17, 1975, Grady, J., Index #834/75; People ex rel. Gary v. Vincent, Sup. Ct., Dutchess County, December 11, 1974, Grady, J., aff'd_____ A.D. 2d_____, Second Dept. 1975).

Accordingly, the writ is sustained and the parole warrant vacated and relator is directed to be restored forthwith to parole status subject to the conditions imposed thereunder.

The foregoing constitutes the decision and order of this Court.

A copy hereof shall be served upon respective counsel and upon relator at his place of confinement.

To commence the statutory time period for appeals as of right (CPLR 5513(a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Dated: White Plains, N. Y.
October 17, 1975

/s/ Harold L. Wood
HAROLD L. WOOD
J.S.C.

NANCY LEE, ESQ.
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The Legal Aid Society

Parole Revocation Defense Unit

15 Park Row, New York, N. Y. 10038

HON. LOUIS J. LEFKOWITZ
Attorney General of State of N. Y.
Attorney for Respondents

I certify a copy
has been mailed
to the A. Gen. of the State
of N.Y.

Regis Theard Bangser
11/20/75.